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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSICA ANN FALKNOR,

Defendant and Appellant.

F076143

(Super. Ct. No. CRF48460)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Sara E. Coppin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Meehan, Acting P.J., Snauffer, J. and DeSantos, J.

Jessica Ann Falknor (appellant) pled guilty to vehicular manslaughter while intoxicated (Pen. Code,<sup>1</sup> § 191.5, subd. (b)), driving under the influence causing bodily injury to another (Veh. Code, § 23153, subd. (a)) with the personal infliction of great bodily injury enhancement (§ 12022.7, subd. (a)), and child abuse (§ 273a, subd. (a)) with the personal infliction of great bodily injury on a child under the age of five enhancement (§ 12022.7, subd. (d)).

On appeal, appellant contends the trial court erred in denying her motion to suppress evidence pursuant to section 1538.5. We conclude appellant's waiver of appellate rights and failure to obtain a certificate of probable cause pursuant to section 1237.5 necessitates dismissal of her appeal.

### **FACTUAL AND PROCEDURAL BACKGROUND**

While driving on a rural two-lane highway, appellant lost control of the vehicle and struck a tree. The car rolled down a steep embankment and ejected passenger Bryon Stutts, who died on scene from his injuries. Passengers Kathryn F., age 20, and B.J., age 3, were also injured in the crash.

Appellant suffered severe injuries and was transported to a nearby hospital for treatment. At the hospital, a responding police officer noticed the odor of alcohol on appellant's person. A phlebotomist drew a sample of appellant's blood, which was tested and shown to contain a 0.10 percent blood-alcohol content.

Appellant moved to suppress the results of her blood test pursuant to section 1538.5, alleging her warrantless blood draw violated the Fourth Amendment. After an extensive evidentiary hearing, the trial court denied the motion to suppress.

Appellant pled guilty pursuant to a negotiated plea agreement and was sentenced to seven years in state prison. During the plea colloquy, the court advised appellant, "you understand there won't be any appeal from this conviction," to which appellant replied,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

“Yes.” After appellant entered her plea of guilty, the court found appellant “knowingly and intelligently waived her rights” and that her plea was made “freely and voluntarily.”

Appellant also filled out, initialed, and signed an advisement and waiver of rights form, containing the following admonition: “Waiver of Appeal: I understand that I will be waiving my right to appeal and I will not be able to appeal from this Court’s sentence based on the plea that I enter into in this matter.” Next to this admonition appellant initialed two boxes; the first labeled, “I understand this right,” and the second labeled, “I give up this right.” At the bottom of the form immediately above appellant’s signature, the form reads: “Defendant’s statement: I have read and understand the front and back of this form. I have had enough time to speak with my attorney; I have told my attorney everything I know about this case; my attorney has explained to me my rights, my defenses, and the possible consequences of my plea .... I am entering this plea freely and voluntarily.”

Appellant filed a timely notice of appeal, but it did not contain a request for a certificate of probable cause pursuant to section 1237.5. Instead, the notice stated: “This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5,” and “This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.”

After the parties completed briefing, this court issued a briefing order pursuant to Government Code section 68081 directing the parties to address the following: “Is the appeal barred for failure to obtain a certificate of probable cause pursuant to Penal Code section 1237.5 and California Rules of Court, rule 8.304, considering appellant waived her appellate rights upon entry of her guilty plea? (See *People v. Mashburn* (2013) 222 Cal.App.4th 937 [(*Mashburn*)).]” In addition to filing a supplemental brief,<sup>2</sup> appellant

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<sup>2</sup> Respondent did not file a supplemental responsive brief.

filed a motion requesting leave to seek a belated certificate of probable cause in the trial court.<sup>3</sup>

## DISCUSSION

“[I]t is well settled that a plea bargain may include a waiver of the right to appeal.” (*People v. Buttram* (2003) 30 Cal.4th 773, 791 (conc. opn. of Baxter, J.) (*Buttram*)). “To be enforceable, a defendant’s waiver of the right to appeal must be knowing, intelligent, and voluntary. [Citations.] Waivers may be manifested either orally or in writing. [Citation.] The voluntariness of a waiver is a question of law which appellate courts review de novo.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

Section 1237.5 prohibits the appeal of a conviction following a plea of guilty or no contest unless the appellant obtains a certificate of probable cause from the trial court. California Rules of Court, rule 8.304(b)(4) provides exceptions to the section 1237.5 requirement if the appeal is based on: “(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea’s validity.”

However, “when a defendant waives the right to appeal as part of a plea agreement, and the waiver’s terms encompass the issue the defendant wishes to raise, the defendant must obtain a certificate of probable cause to avoid dismissal of the appeal.” (*People v. Espinoza* (2018) 22 Cal.App.5th 794, 803.) This is because applicability of section 1237.5 is ultimately based on whether the issue raised on appeal is “*in substance* a challenge to the validity of the plea ....” (*Buttram, supra*, 30 Cal.4th at p. 782.) A challenge to the enforceability of the appellate waiver, or to some other aspect of the case encompassed by the waiver, constitutes a challenge to the validity of the plea because it

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<sup>3</sup> Appellant’s “Application for Permission to Seek a Certificate of Probable Cause in Tuolumne County Superior Court,” filed on November 29, 2018, is denied. (*In re Chavez* (2003) 30 Cal.4th 643, 657.)

necessarily attacks an express term of the plea. (*Mashburn, supra*, 222 Cal.App.4th at p. 943, citing *Buttram, supra*, 30 Cal.4th at p. 793 (conc. opn. of Baxter, J.).)

*Mashburn* presented a factual scenario almost identical to the instant case. After the appellant's section 1538.5 motion was denied, he pled no contest, waived his right to appeal, and later filed a notice of appeal based on the denial of the section 1538.5 motion without obtaining a certificate of probable cause. (*Mashburn, supra*, 222 Cal.App.4th at pp. 940-941.) On appeal, the appellant claimed his section 1538.5 motion should have been granted, he did not knowingly and intelligently waive his right to appeal, and the waiver did not encompass a challenge to the denial of the section 1538.5 motion. (*Mashburn*, at p. 941.) The court dismissed the appeal for failure to obtain a certificate of probable cause, concluding the appellant's attempt to appeal the denial of the section 1538.5 motion, notwithstanding the appellate waiver, challenged the validity of the plea itself. (*Mashburn*, at p. 943.)

We conclude *Mashburn* is applicable here. Appellant seeks to challenge the denial of the section 1538.5 motion but waived the right to appeal as part of the negotiated plea agreement. Without a certificate of probable cause, appellant cannot raise any issue encompassed by the waiver of appellate rights. Therefore, we cannot reach the merits of appellant's claim, and must dismiss the appeal.

#### **DISPOSITION**

The appeal is dismissed.